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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. ANTONIO BAHENA, Defendant and Appellant.	G042539 (Super. Ct. No. 06WF3111) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, W. Michael Hayes and David A. Hoffer, Judges. Affirmed in part and reversed in part.

Patricia A. Scott, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Gil Gonzalez and William M. Wood, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

In two jury trials, defendant Antonio Bahena was convicted of firing at an inhabited dwelling (Pen. Code, § 246; all further statutory references are to this code unless otherwise specified; count 2), felonious possession of loaded firearm by a gang member (§ 12031, subd. (a)(1), (2)(C); count 3), and street terrorism (§ 186.22, subd. (a); count 4). The jury found true, that as to shooting at an occupied dwelling, defendant carried a loaded firearm to benefit a gang (§ 186.22, subd. (b)(1)) and personally discharged a firearm (§ 12022.53, subd. (c)). The juries in both trials failed to reach a verdict on a charge of attempted murder. The court sentenced defendant to 15 years to life on count 2 plus a consecutive 20 years for the firearm discharge. The court also imposed two-year concurrent terms for counts 3 and 4.

Defendant claims the court incorrectly instructed the jury as to the street terrorism and the firearm possession counts, the court improperly admitted evidence of defendant's prior uncharged act and the gang expert's testimony based on hypothetical facts, and sentencing error. The Attorney General agrees with the claim the jury was improperly instructed as do we and we reverse and remand as to counts 3 and 4. Finding no other error we otherwise affirm.

FACTS

One day as Jasmine Carrillo and Evelia Hernandez were separately walking down Stuart Street they each saw three Hispanic men walking together. One wore a baseball cap and all three wore hooded sweatshirts. The men stopped in front of an apartment building and one yelled, "Darkside, Santa Ana." One of them then fired shots toward an apartment complex across the street. The three men then fled. Jose Flores, who lived in one of the buildings, was outside, and while hearing the shots saw something hit the building wall right next to him, causing him to drop to the ground. He then ran into his apartment and called his parole officer to report the incident.

Police officer Allan Harry, responding to a call about the shooting, saw three men matching the description of the suspects walking down the street and commanded them to stop. One man, wearing a gray sweatshirt and subsequently identified as defendant, ran away. Harry detained the other two men, Irvin Rodriguez and Joaquin Martinez. (These two were tried separately from defendant.) Defendant was subsequently found lying under a bush in a back yard of a residence; next to him were a gray sweatshirt and a baseball cap, clothing typically worn by Darkside members.

When defendant was questioned he stated he knew members of Darkside, including Rodriguez and Martinez, and had been arrested with other Darkside members. In an interview with detectives Peter Vi and George Kaiser the day after the shooting defendant said he had found the gun and was going to sell it. In the meantime he saw the Hispanic male, whom he recognized as someone who had harassed his sister at a Quinceanera event a few weeks before. With the intent to scare the man and thinking the safety was on, defendant pointed the gun up and pulled the trigger one time. The gun fired and the target, defendant and his cohorts ran; defendant threw the gun.

Kaiser, testifying as a gang expert, said Darkside was criminal street gang whose primary activities were attempted robbery, vandalism, and vehicle theft. The predicate offenses were attempted robberies in 2004 and a car theft in 2006 by Rodriguez. Darskide claimed Stuart Street as part of its territory. At least one other gang, Goldenwest Street, a rival of Darkside, also claimed that street as its turf. A few years before this shooting, Rodriguez's brother, a member of Darkside, whose family lived on Stuart Street, had been shot, supposedly by a member of Goldenwest.

It was Kaiser's opinion defendant, Rodriguez, and Martinez were active members of Darkside when the shooting took place. Kaiser testified the shooting was committed in association with Darkside for its benefit and also that it assisted, promoted, and furthered the gang's criminal activity.

Martinez testified only at the second trial. In a police interview following the shooting, which was played for the jury, he stated he was an associate of Darkside, and Rodriguez and defendant were members. When the three were walking down Stuart Street on the day of the shooting, they saw a Hispanic male whom defendant and Rodriguez identified by his gang name as a member of a rival gang. Rodriguez yelled "Darkside" and, upon hearing gunfire, Martinez saw defendant shooting a gun at the Hispanic male who ran toward his apartment. The three then fled. In another interview with police Martinez said defendant yelled "Darkside" and told them the Hispanic male had been involved in an incident with Rodriguez's brother.

DISCUSSION

1. Gang Member in Possession of a Loaded Firearm and Street Terrorism

In the first trial the jury convicted defendant of being a gang member in possession of a loaded firearm and street terrorism but was unable to reach a decision on the attempted murder and shooting at an inhabited dwelling counts. Defendant argues the court improperly instructed the jury that the necessary felonious conduct to prove street terrorism could include possession of a loaded firearm in public. Thus, he continues, the convictions from the first trial must be reversed. The Attorney General agrees as do we.

Section 12031, subdivision (a)(1) prohibits a person from carrying a loaded firearm in public. Subdivision (a)(2)(C) makes violation of the otherwise misdemeanor conduct a felony where a person is an active member of a street gang. That element has been interpreted to mean "the substantive gang offense defined in section 186.22[, subdivision](a)." (*People v. Robles* (2000) 23 Cal.4th 1106, 1115.) "[A]ll of section 186.22[, subdivision](a)'s elements must be satisfied, including that defendant willfully promoted, furthered, or assisted felonious conduct by his fellow gang members before section 12031[, subdivision](a)(2)(C) applies to elevate defendant's section

12031, subdivision (a)(1) misdemeanor offense to a felony. Stated conversely, section 12031[, subdivision](a)(2)(C) applies only after section 186.22[, subdivision](a) has been completely satisfied by conduct distinct from the otherwise misdemeanor conduct of carrying a loaded weapon in violation of section 12031, subdivision (a)(1)." (*People v. Lamas* (2007) 42 Cal.4th 516, 524, italics omitted.)

Here the court instructed the jury that to convict defendant of street terrorism, in addition to finding defendant was an active participant in a street gang knowing the members engage or engaged in criminal activity, it had to find defendant promoted or furthered "felonious criminal conduct by members of the gang" by personally committing a felony or aiding and abetting a felony. (CALCRIM No. 1400.) The court also instructed that if the jury found defendant guilty of the firearm possession charge it had to then determine whether defendant actively participated in a street gang under section 12031, subdivision (a)(2)(C). (CALCRIM No. 2542.)

As the parties agree, this was error. The jury did not convict defendant of any felony. Since defendant was only convicted of possession of the firearm and street terrorism, the jury had to have relied on the former as the underlying felony, in violation of *Lamas*. "[D]efendant's misdemeanor conduct—being a gang member who carries a loaded firearm in public—cannot satisfy section 186.22[, subdivision](a)'s third element, felonious conduct, and then be used to elevate the otherwise misdemeanor offense to a felony." (*People v. Lamas, supra*, 42 Cal.4th at p. 524.) Thus, the convictions in the first trial must be reversed.

2. Evidence of Uncharged Shooting

a. Background

During an interview with defendant the day after the shooting, Kaiser asked him about an incident at a Quinceanera event a few weeks before where a member of a rival gang, Hard Times, had bothered defendant's sister. When defendant learned of it he

went to the party and confronted the man, who swung at him; defendant then chased the man, firing a gun at him. Prior to the second trial defense counsel sought to redact the portion of the taped interview describing this event. The prosecution responded that this incident was part of the foundation for Kaiser's opinion defendant was a member of a street gang. Upon prompting from the court, defendant agreed he wanted to prevent Kaiser from testifying about this incident.

After weighing the testimony under Evidence Code section 352, the court denied the motion. While acknowledging the potential prejudice the court found the evidence was "highly probative" and typical of hearsay evidence a gang expert uses to reach the opinion the defendant is part of a street gang.

The taped interview between Kaiser and defendant was played to the jury. Kaiser testified he relied on the Quinceanera incident as part of the basis for his opinion defendant was an active member of Darkside when the shooting occurred. He stated that a woman who witnessed the event claimed defendant had pulled a gun from under his shirt, and while chasing a man, fired once toward him. Defendant again objected and requested a mistrial, which the court denied.

Before Kaiser testified on this issue the court had instructed the jury that it could "consider evidence of gang activity only for a limited purposed in deciding whether the defendant acted with the intent, purpose and knowledge that are required for the gang-related enhancement or the defendant had a motive to commit the crimes charged. [¶] The jury may also consider this evidence when it evaluates the credibility or believability of a witness and when the jury considers the facts and information relied on by an expert witness in reaching his or her opinion. [¶] You may not consider this evidence for any other purpose. You may not conclude from this evidence that the defendant is a person of bad character or that he has a disposition to commit crime." (CALCRIM No. 1403.) Counsel for both parties asked that this instruction not be repeated after the Quinceanera evidence came in. During cross-examination Kaiser

testified he did not know whether the Quinceanera event had been investigated or the information substantiated. He did identify the person who had told him about it.

b. Admission of Evidence

The challenged testimony was admitted as part of the basis for Kaiser's opinion defendant belonged to a gang. Experts are allowed to rely on "material that is not admitted into evidence so long as it is material of a type that is reasonably relied upon by experts in the particular field . . .," including hearsay. (*People v. Gardeley* (1996) 14 Cal.4th 605, 618; see also Evid. Code, § 801, subd. (b).) They are also allowed to testify to the reasons for their opinions, including inadmissible hearsay. (Evid. Code, § 802.) But the trial court has broad discretion to limit the amount of hearsay evidence presented by an expert's testimony where its probative value is outweighed by its prejudicial effect to guard """against the risk that the jury might improperly consider it as independent proof of the facts recited therein." [Citation.]' [Citation.]" (*People v. Bell* (2007) 40 Cal.4th 582, 608; see also Evid. Code, § 352.)

Defendant contends Evidence Code section 352 barred admission of the testimony as cumulative because the prosecution had more than enough other evidence to prove he was a gang member. He relies on *People v. Leon* (2008) 161 Cal.App.4th 149, where the trial court allowed the prosecution to introduce evidence of a prior true finding of robbery to prove gang enhancements and predicate gang crimes. The appellate court held this was an abuse of discretion in violation of Evidence Code section 352. (*People v. Leon*, *supra*, 161 Cal.App.4th at p. 169.) Because """substantial prejudicial effect [is] inherent in [such] evidence," uncharged offenses are admissible only if they have substantial probative value. If there is any doubt, the evidence should be excluded. [Citation.]' [Citations.]" (*Id*. at p. 168.) One basis for exclusion is when the evidence is cumulative, as was the case there (*id*. at p. 169) where the prosecution had more than

sufficient evidence the defendant was a member of a street gang and of two other predicate crimes (*ibid*.).

But *Leon* also held the error was harmless. Because of the substantial evidence the defendant committed the crimes and did so in association with his gang and to assist other criminal conduct by the gang members, it was not reasonably probable the defendant would have achieved a more favorable result had the evidence been excluded. (*People v. Leon, supra,* 161 Cal.App.4th at pp. 169-170.)

Such is the case here. The evidence defendant took a gun to the party to avenge the alleged harassment of his sister by a rival gang member is certainly relevant as a basis for Kaiser's opinion of defendant's gang membership. Thus, he could testify to that effect. This is consistent with his additional testimony that when a gang member or his family is insulted or harmed by a member of a rival gang, the gang member will retaliate with varying degrees of violence to earn and keep respect, power, and reputation for himself and his gang. Further, although there was other evidence of defendant's participation in Darkside, as defendant asserts, the evidence was not impermissibly cumulative. As the Attorney General points out the Quinceanera incident was recent, compared to evidence of membership that was six months and older. It does not matter that the rivals in the two shootings were from different gangs; both were rivals.

But the remaining evidence of the manner and details of the shooting at that event are not relevant to or necessary for formation of his opinion defendant belonged to a gang. As inadmissible hearsay, it should have been excluded. In allowing it to come in the court did not properly exercise its discretion to weigh prejudice against the probative nature of the evidence under Evidence Code section 352.

Nevertheless, as in *Leon*, the admission of the evidence was harmless. It is not reasonably probable that had this testimony been excluded, the jury would have reached a different result. (*People v. Fudge* (1994) 7 Cal.4th 1075, 1102-1103; *People v. Watson* (1956) 46 Cal.2d 818, 836.) Based on his postarrest interviews with Kaiser,

defendant's position was that he never shot at Flores, or, by extension, the apartment building, but that he only fired the gun in the air to scare Flores. He points to evidence that the manager of Flores's apartment told police the bullet mark on a wall of the apartment was not recent and another resident of the apartment stated she did not hear a bullet hit the wall outside of her unit at the time she heard gunshots. From this defendant concludes that without the Quinceanera testimony there was no evidence defendant had ever committed any gun-related crimes and the only evidence the jury would have had was the accomplice testimony of Martinez that defendant shot at Flores and not in the air.

But the record says otherwise. Kaiser testified he and Vi examined the outside wall of the apartment and saw "marks" on the apartment building. When police asked the apartment manager to look at them, he said he was not familiar with them. Moreover, the only evidence that was admitted erroneously was the details of the shooting at the Quinceanera, not the fact defendant went to the event with a gun to challenge a rival gang member who had allegedly harassed his sister.

Further, admission of that evidence did not implicate defendant's due process rights. That occurs only if admission "makes the trial fundamentally unfair. [Citations.]" (*People v. Partida* (2005) 37 Cal.4th 428, 439, italics omitted.) That did not occur here.

In the reply brief defendant complains about CALCRIM No. 1403 given to limit the admissibility of the evidence. He asserts the portion that allowed the jury to consider the evidence in determining credibility. We need not consider issues raised for the first time in a reply brief. (*People v. Lewis* (2008) 43 Cal.4th 415, 536, fn. 30.) Moreover, we see nothing in the record that he objected to the instruction at the time it was given.

We want to note, however, the limiting instruction given by the court was not ideal. The only portion of CALCRIM No. 1403 the court should have given in this context was that the jury could consider the evidence in determining the credibility of

Kaiser and the information on which he based his opinion, and for no other purpose. It should not have instructed the jury that the Quinceanera evidence could be considered to prove the gang enhancement.

3. Expert's Testimony Based on Hypothetical Question

In answer to a hypothetical question incorporating facts based on the evidence adduced at trial, offered as proof of the gang enhancement, Kaiser testified that it was his opinion the crime would have been committed in association with or for the benefit of a gang, and that it would promote the gang's reputation. Relying on *People v. Killebrew* (2002) 103 Cal.App.4th 644, defendant argues this was improper opinion testimony because Kaiser testified as to defendant's intent and told the jury how it should decide the case. *Killebrew* has been interpreted to bar an expert from giving his opinion about the intent of the defendant being tried. (*People v. Gonzalez* (2006) 38 Cal.4th 932, 946.)

But testimony about the intent of a hypothetical defendant based purely on hypothetical facts is the "'proper way of presenting expert testimony.'" (*People v. Garcia* (2007) 153 Cal.App.4th 1499, 1513.) "[T]here is a difference between testifying about specific persons and about hypothetical persons. It would be incorrect to read *Killebrew* as barring the questioning of expert witnesses through the use of hypothetical questions regarding hypothetical persons." (*People v. Gonzalez, supra*, 38 Cal.4th at p. 946, fn. 3.) "*Killebrew* does not preclude the prosecution from eliciting expert testimony to provide the jury with information from which the jury may infer the motive for a crime or the perpetrator's intent; *Killebrew* prohibits an expert from testifying to his or her opinion of the knowledge or intent of a defendant on trial. [Citation.]" (*People v. Gonzalez* (2005) 126 Cal.App.4th 1539, 1551.) Here Kaiser properly testified about a hypothetical shooter based on hypothetical facts. (*People v. Gonzalez, supra*, 38 Cal.4th at p. 946.)

4. Sentence

Section 186.22, subdivision (b)(4) provides that a defendant convicted of a specified felony where the gang enhancement is found to be true is to be sentenced "to an indeterminate term of life imprisonment with a minimum term of the indeterminate sentence calculated as the greater of: [¶] (A) The term . . . for the underlying conviction, including any enhancement applicable . . . if the felony is any of the offenses enumerated in subparagraph (B) . . . of this paragraph. [¶] (B) Imprisonment in the state prison for 15 years, if the felony is a . . . violation of [s]ection 246 . . . ."

Defendant was sentenced to 35 years to life for shooting at an inhabited dwelling (§ 246), consisting of 15 years to life under section 186.22, subdivision (b)(4)(B) for the substantive crime plus a consecutive term of 20 years for the enhancement under section 12022.53, subdivision (c). Defendant argues he should have been sentenced under section 186.22, subdivision (b)(4)(A), which would subject him to a term of 23, 25, or 27 years to life for this crime. He claims that this is the "greater of" the two alternative sentences as required under section 186.22, subdivision (b)(4).

People v. Jones (2009) 47 Cal.4th 566 dispels this claim. There the defendant was convicted of shooting at an inhabited dwelling (§ 246) and the jury found he personally discharged a gun and acted to benefit a gang. In discussing the proper sentence the Supreme Court stated: "By itself, that felony carries a maximum sentence of seven years in prison. But when, as here, the crime is committed to benefit a criminal street gang, the punishment is life imprisonment, with a minimum parole eligibility of 15 years. (§ 186.22[, subd.](b)(4).) And when, as here, a defendant personally and intentionally discharges a firearm in the commission of '[a]ny felony punishable . . . by imprisonment in the state prison for life' (§ 12022.53, subd. (a)(17)), section 12022.53 [, subdivision](c) requires imposition of an additional 20-year prison term." (*Id*. at p. 572.)

Defendant agrees we are bound by *Jones* as far as it goes but argues it did not consider the exact issue before us. Although the *Jones* court did not address that issue directly, it affirmed the identical sentence imposed here.

Defendant directs us to *People v. Sok* (2010) 181 Cal.App.4th 88 where the issue was whether an enhancement term, which was used to calculate the minimum sentence under section 186.22, subdivision (b)(4)(A), could be added again. The court held it could not. (*People v. Sok, supra*, 181 Cal.App.4th at p. 97.) The defendant in *Sok* was convicted of shooting at an occupied car (§ 246) with a firearm use enhancement under section 12022.53, subdivision (d); the defendant also had a prior strike. The court ruled section 186.22, subdivision (b)(4)(A), not subdivision (b)(4)(B), determined the sentence because it was the greater minimum term. (*People v Sok, supra*, 181 Cal.App.4th at p. 96.) It was calculated as three, five, or seven years under section 246 plus 25 years for the enhancement, doubled for the strike. (*Id*. at p. 97.) This, however, is not how the Supreme Court in *Jones* calculated the sentence for crimes identical to those in the case before us.

Defendant asserts that applying *Jones*'s reasoning leads to anomalous and unfair results. To illustrate he posits two situations, both involving defendants acting on behalf of a street gang who shoot at inhabited dwellings. Under *Jones*, one who does not hit anyone would be sentenced under section 186.22, subdivision (b)(4)(B) to 35 years to life, while a second defendant who kills or injures someone, under *Sok* is sentenced to the three to seven year range under section 246 plus 25 years under section 186.22, subdivision (b)(4(A) would serve only 28 to 32 years to life. Defendant claims *Jones* should be "revisited and the issues clarified." But as defendant acknowledges we are bound by *Jones* (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455) and must leave clarification of it, if there is to be any, to the Supreme Court or the Legislature.

DISPOSITION

The convictions for street terrorism and possession of a firearm to benefit a criminal street gang are reversed. In all other respects the judgment is affirmed.

RYLAARSDAM, ACTING P. J.

WE CONCUR:

O'LEARY, J.

FYBEL, J.